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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL MURDOCK,

Defendant and Appellant.

C069370

(Super. Ct. No.  
10F06700)

Defendant Michael Murdock entered a plea of no contest to felony evading an officer and transportation of cocaine base and admitted a prior drug conviction in exchange for a stipulated state prison sentence of seven years eight months which the court imposed. Having obtained a certificate of probable cause (Pen. Code, § 1237.5), defendant appeals, contending that the trial court erred in failing to hold an in camera hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) when he sought to withdraw his plea. Relying upon *People v. Brown*

(1986) 179 Cal.App.3d 207 (*Brown*) and *People v. Osorio* (1987) 194 Cal.App.3d 183 (*Osorio*) (disapproved on other grounds in *People v. Johnson* (2009) 47 Cal.4th 668), defendant also contends that he was denied effective representation of counsel in the presentation of his motion to withdraw his plea. We affirm the judgment.

### FACTS AND PROCEEDINGS

About 3:17 a.m. on August 14, 2010, Sacramento Police Officer Jake Hensley saw an approaching truck without its headlights turned on and activated his overhead lights to stop the truck. The truck eventually pulled over. Defendant, the driver, made furtive movements inside the passenger compartment of the truck. The officer ordered defendant to keep his hands on the steering wheel and had to repeat his order. Defendant did not have a driver's license and claimed the truck belonged to his wife who was the passenger. Defendant rolled up the window and fled. The officer pursued the truck which reached 80 miles per hour and failed to stop at stop signs and red lights. Defendant abandoned the truck when he came to a dead end and fled on foot. A search of the truck revealed a baggie containing 16.4 grams of cocaine base.

A complaint charged defendant with felony evading, possession of cocaine for sale, and transportation of cocaine.

An amended complaint filed the same date that the preliminary hearing was held charged defendant with felony evading, possession of cocaine base for sale, and transportation

of cocaine base and alleged that he had sustained three prior drug convictions. At the preliminary hearing, the prosecutor dismissed a strike prior which had been alleged in the amended complaint because defendant committed the robbery offense when he was 15 years old.

After defendant was held to answer, defense counsel filed a *Pitchess* (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531) motion and the court ordered disclosure of records related to one incident.

About a month later, defendant entered his negotiated plea of no contest to evading and transportation and admitted one prior drug conviction in exchange for a stipulated sentence of seven years eight months.

At sentencing two weeks later, defense counsel informed the court that defendant "is indicating to me now that he would like to withdraw his plea" and had defendant state his grounds. Defendant stated: "I feel like my rights have been violated between the time of the preliminary hearing and now. I feel that if I had my own representation, my own choice, my rights wouldn't have been violated in such a way that I feel like all the evidence at the preliminary hearing was based on reckless or misguided information, and the officer had filed the police report. It didn't show probable cause that I had committed the crimes or part of the crimes that related to this. Never had any type of discovery or any evidence defending myself in the preliminary hearing, which is evidence against me, but none for me to prove or provide that--against him, such as my physical

evidence or witnesses that I asked to be interrogated or presented, you know, such as my parole officer or officers' statements or writing material. [¶] I feel like the in-car camera was suppressed against me. Other people that had any lawyer that would be made, an in-car camera, an audio recording, preliminary hearing. I still like feel there's a whole lot of injustice toward me in this case. Like the whole prosecution of this case was malicious towards me."

Upon the court's query whether she had anything to say, defense counsel stated that "we had the police report" and she "talk[ed] with him about the police report as I always do before preliminary hearing." She further stated that the in-car camera had been requested which was usually done after the preliminary hearing. For tactical reasons, defense counsel noted that she "generally ha[d] never in her 13 and a half years called witnesses at a preliminary hearing for obvious reasons."

The court stated that it was "extraordinarily rare" for the defense to call witnesses at a preliminary hearing and proceeded to explain the purpose of the hearing as compared to a trial.

Upon the court's invitation, the prosecutor added that there was "no general right of discovery prior to preliminary hearing" and that the in-car camera had been discovered to defense counsel. When asked whether the People opposed defendant's motion to withdraw his plea, the prosecutor confirmed that they did and that there was no "justifiable basis" for the motion.

The court denied defendant's motion to withdraw his plea, commenting that defendant had not shown clear and convincing evidence of good cause and that he had been represented by counsel when he entered his plea. The court also stated, "What [defendant] has indicated here sounds almost--go to potentially a claim of incompetency of counsel in a habeas type proceeding, or appeal, but does not establish grounds for--in this Court's thinking--setting aside the plea."

The court started to impose sentence and defendant interrupted, asking to "add one more thing." The court responded that defendant would be allowed to do so after sentencing.

After he was sentenced, defendant stated: "I just wanted to ask before I--before I was--before I took the deal, I told my lawyer more than one time--like three or four times that I did not want to take the deal. And we had said at the side--at the side where I told her I wasn't going to take the deal. She actually went out and talked to my mother, and my mother asked me to take the deal. But at that time, I tell her that I thought I was under duress by my mother being that she was older. She felt bad. By my lawyer saying that, well, he is going to get 18 years, if he gets found guilty. I'm not there. That's the maximum of all my prison priors. I'm not guaranteed to get 18 years, so she misled my mother, and my mother was under duress to have me take the deal. I never would have taken the deal. I told her more than several times I don't want to take the deal. I'm not guilty of this." The court noted that

an entry of plea advisement included questioning about whether he was entering the plea freely and voluntarily and that the transcript of the entry of plea hearing would be before the reviewing court and considered by defendant's appellate counsel. Defendant had nothing further to add.

## DISCUSSION

### I

#### *The Marsden Issue*

Defendant contends the trial court erred in failing to conduct a *Marsden* hearing. Although conceding that he did not expressly request substitute counsel, defendant argues that there was some clear indication that he wanted substitute counsel, noting that he complained that counsel failed to interview or present the testimony of certain witnesses including his parole officer at the preliminary hearing and that counsel misled defendant's mother about the maximum defendant faced if convicted on all charges and allegations. Defendant also refers to the trial court's observation that defendant was complaining about the competency of counsel, that the court turned to counsel for her response as it would in a *Marsden* proceeding, and defense counsel's deferment to defendant to explain why he wanted to withdraw his plea. We conclude that defendant never clearly indicated that he wanted substitute counsel.

*People v. Sanchez* (2011) 53 Cal.4th 80 (*Sanchez*) held that "a trial court is obligated to conduct a *Marsden* hearing on

whether to discharge counsel for all purposes and appoint new counsel when a criminal defendant indicates after conviction a desire to withdraw his plea on the ground that his current counsel provided ineffective assistance only when there is 'at least some clear indication by defendant,' either personally or through his current counsel, that defendant 'wants a substitute attorney.'" (*Id.* at pp. 89-90.) In so holding, *Sanchez* disapproved several cases, including cases relied upon by defendant (*People v. Eastman* (2007) 146 Cal.App.4th 688; *People v. Meija* (2008) 159 Cal.App.4th 1081; *People v. Mendez* (2008) 161 Cal.App.4th 1362), in which the appellate court had "incorrectly implied that a *Marsden* motion can be triggered with something less than a clear indication by a defendant, either personally or through current counsel, that the defendant 'wants a substitute attorney.'" (*Sanchez*, at p. 90, fn. 3.)

Although defendant moved to withdraw his plea based in part upon counsel's competency, neither defendant nor his counsel clearly indicated that he wanted a substitute attorney to represent him. Unlike defense counsel in *Sanchez* (53 Cal.4th at pp. 85, 90, fn. 3, 91), defense counsel did not request appointment of substitute counsel to investigate the grounds for filing a motion to withdraw defendant's plea. And defendant never expressly requested a substitute attorney. Instead, defendant wanted to use counsel's incompetency as well as the violation of his "rights," lack of discovery, no probable cause, malicious prosecution, and duress, as grounds for his motion to withdraw his plea. Even though the court asked whether defense

counsel wished to respond to defendant's complaints, the court never mentioned the *Marsden* case and never described defendant's request as one for substitute counsel. Instead, the court referred to defendant's motion as a motion to withdraw his plea. We conclude that the trial court did not err in not conducting a *Marsden* hearing.

## II

### *Effective Representation of Counsel*

Relying upon *Brown, supra*, 179 Cal.App.3d 207 and *Osorio, supra*, 194 Cal.App.3d 183, defendant contends he was effectively deprived of his right to counsel in the presentation of his motion to withdraw his plea. We reject this contention. The trial court properly denied defendant's motion because he failed to make a colorable claim that he was ineffectively represented.

*People v. Makabali* (1993) 14 Cal.App.4th 847, summarized several cases, including *Brown* and *Osorio*, which we quote at length:

"In *Brown*, defense counsel informed the court of her client's desire to withdraw his plea, but said she would not make the motion on his behalf because she did not believe there was any "legal basis at this time for him to move the court to withdraw his plea."" The trial court denied the defendant's request to have another lawyer appointed to make the motion, but permitted Brown to make the motion himself. [Citation.] The appellate court concluded Brown was deprived of his right to make a motion *assisted by counsel*. The court acknowledged that



an attorney of record has the exclusive right to appear in court and control court proceedings, but found 'the decision to seek withdrawal of a plea of guilty, just as the decision to enter such plea' is one within the defendant's power to make, although counsel may, when appropriate, advise against the decision. [Citation.] In sum, the court concluded defense counsel was *required* to present the motion to withdraw *unless* the motion 'in counsel's good faith opinion, is frivolous or when to do so would compromise accepted ethical standards.' [Citations.]

"The Fifth District followed *Brown* in *People v. Osorio*, *supra*, 194 Cal.App.3d 183. There, defense counsel declined to assist the defendant in filing a motion to withdraw a plea-- despite the admitted presence of possible grounds for the motion--because the attorney could not do so "'in good conscience.'" [Citation.] The reviewing court concluded 'counsel's representation to the court that there was a colorable basis for the motion to withdraw the guilty plea' required remand for the limited purpose of permitting the defendant to make a motion to withdraw his plea. [Citation.]

"In *People v. McLeod* (1989) 210 Cal.App.3d 585, on the other hand, the Sixth District found the case fell within the 'ethical standards' exception to the *Brown* rule because defense counsel's statements indicated he *could not* make the motion on the defendant's behalf, thus suggesting he had an ethical reason for not doing so. (*McLeod, supra*, at pp. 589-590.)

"Finally, . . . [i]n *People v. Garcia* [1991] 227 Cal.App.3d 1369 [the Sixth District] reasoned where 'the gravamen of the

motion for withdrawal rest[s] on allegations which are properly characterized as claims of ineffective representation . . . there should be a limited exception to the general rule articulated in *Brown*. To hold otherwise would place the attorney in an intolerable position, requiring him to assert his own incompetence and thereby creating a conflict of interest between the client's interests and that of the attorney.' [Citation.] Consequently, where a defendant 'seeks to withdraw a plea on the ground that his attorney of record has not provided adequate representation, . . . the trial court should follow a procedure comparable to that specified in *People v. Stewart* (1985) 171 Cal.App.3d 388, 395-397. The trial court should first elicit and consider the defendant's reasons for believing he has been ineffectively represented . . . . If the defendant "presents a colorable claim that he was ineffectively represented," the trial court should appoint new counsel "to fully investigate and present the motion." . . . If the defendant does not present a colorable claim, the court may deny the motion without providing for new counsel.' [Citation.]" (*People v. Makabali, supra*, 14 Cal.App.4th at pp. 851-852.)

Here, defendant complained about the violation of his rights "between the time of the preliminary hearing" and sentencing. He asserted that all of the evidence at the preliminary hearing was "based on reckless or misguided information" and did not show probable cause. He claimed there had been no discovery and counsel failed to present any defense evidence at the preliminary hearing. He also complained that

the in-car camera recording had been "suppressed" and not presented at the preliminary hearing. He asserted malicious prosecution.

When asked, defense counsel stated she had discussed the police report with defendant before the preliminary hearing, had requested the in-car camera recording after the preliminary hearing, and noted she did not, and had never, called defense witnesses at the preliminary hearing. The court added that it was "extraordinarily rare" for the defense to call witnesses at the preliminary hearing. The prosecutor added there was no discovery right prior to the preliminary hearing and the in-car camera recording had been discovered to defense.

Having elicited defendant's complaints and heard from both counsel, the trial court was able to intelligently rule on whether new counsel should be appointed to more fully develop the claim of ineffective assistance of counsel in defendant's motion to withdraw his plea. Defendant failed to make a colorable claim entitling him to substitute counsel to present a motion to withdraw his plea. He failed to credibly establish the possibility that defense counsel failed to perform in a competent manner. The evidence at the preliminary hearing was ruled upon by a magistrate who found sufficient cause to hold defendant to answer. Defense counsel obtained the police report before the preliminary hearing and obtained the in-car camera recording after the preliminary hearing. The prosecutor explained there was no discovery right prior to the preliminary hearing. The recording was not "suppressed."

Defendant added that he felt pressured by his mother to take the deal. He claimed defense counsel had given his mother incorrect information to get her to pressure defendant to take the deal. "Mistake, ignorance or any other factor overcoming the exercise of free judgment is good cause for withdrawal of a guilty plea. [Citations.]" (*People v. Cruz* (1974) 12 Cal.3d 562, 566.) A plea may be withdrawn if the plea was entered into as a result of duress. (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208.)

Defendant never said counsel gave *him* incorrect information or that counsel misled *him*. Pressure from family members is not the kind of duress which permits withdrawal of a plea. (*People v. Huricks, supra*, 32 Cal.App.4th at p. 1208.) We find no error.

#### DISPOSITION

The judgment is affirmed.

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HULL, J.

We concur:

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RAYE, P. J.

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ROBIE, J.